

BEFORE THE
Federal Communications Commission
WASHINGTON, D.C.

ORIGINAL

RECEIVED

MAR 1 1996

In re Applications of)
)
The Lutheran Church-Missouri Synod)
)
For Renewal of Licenses)
of Stations KFUD/KFUD-FM)
Clayton, Missouri)

MM Docket No. 94-10

File Nos. BR-890929VC

BR-890929VB

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

DOCKET FILE COPY ORIGINAL

To: The Review Board

RESPONSE TO SUBMISSION OF SUPPLEMENTAL AUTHORITIES

The Lutheran Church-Missouri Synod (the "Church"), by its attorneys, hereby responds to the contentions made by the Missouri State Conference of Branches of the NAACP, the St. Louis Branch of the NAACP and the St. Louis County Branch of the NAACP (collectively the "NAACP") in connection with its submission of two additional authorities for the Review Board's consideration.

1. The NAACP contends that Holiday Broadcasting Company (MO&O), FCC 95-510 (released February 1, 1996) ("Holiday") "amplifies and reaffirms the reason the instant case was designated for hearing." The NAACP is wrong. The Commission's statements in Holiday about the Church's record and about the HDO in this case, 9 FCC Rcd 914 (1994) (the "HDO"), are misleading at best. Holiday contains characterizations of the Church's recruitment efforts, and statistics concerning those efforts, which are inconsistent with the findings of the ALJ based on the record in this case. To cite only the most dramatic misstatement, Holiday alleges that the Church "began to recruit only after its renewal applications and EEO programs were questioned." The relevant findings of the ALJ -- to which the NAACP has not excepted -- show

No. of Copies rec'd
List ABCDE

075

that nothing could be further from the truth.^{1/} Holiday also appears to characterize certain of the allegations in the HDO as “findings.” This is wholly inappropriate -- the HDO merely contains unproved allegations. Cleveland Television Corp. v. FCC, 732 F.2d 962, 973 n.13 (D.C. Cir. 1984); Black Television Workshop of Los Angeles, Inc., 4 FCC Rcd 3871, 3873 (1989). Indeed, any attempt to convert the allegations in the HDO into “findings” would raise grave questions about whether the Commission had improperly prejudged the facts of this case in advance of or despite the hearing. Cinderella Career and Finishing Schools, Inc. v. FTC, 425 F.2d 583 (D.C. Cir. 1970).

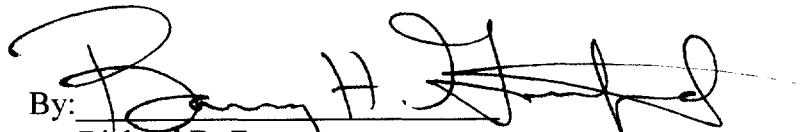
2. In its submission, the NAACP also asks the Review Board to consider the Commission’s recent explanation of the purposes of its EEO Rule and policies. In the Matter of Streamlining Broadcast EEO Rule and Policies. Vacating the EEO Forfeiture Policy Statement and Amending Section 1.80 of the Commission’s Rules To Include EEO Forfeiture Guidelines. Order and Notice of Proposed Rule Making, MM Docket No. 96-16, FCC 96-49 (released February 16, 1996) (the “NPRM”). The NAACP’s submission fails to acknowledge, however, that the Commission’s statements in the NPRM actually confirm that in order to comply with the First Amendment and the Religious Freedom Restoration Act, the FCC must grant religious licensees an exemption from prohibitions on religious discrimination similar to the exemption in section 702 of Title VII. The Commission’s stated intention to “promote programming that reflects the interests of minorities and women in the local community” can in no way justify the refusal to grant a religious exemption. Such an exemption is race and gender neutral -- it merely permits a religious licensee to hire members of its own faith so long as it does not illegally discriminate against women or minorities of that faith. As for the Commission’s policy of

^{1/} Initial Decision of Administrative Law Judge Arthur I. Steinberg, FCC 95D-11, released September 15, 1995, especially ¶¶ 73, 75-77, 79, 81-83, 88, 91, 94, 119-120, 126.

“detering discrimination,” the NPRM explains that this rationale “rests on the belief that a broadcaster that engages in unlawful discrimination cannot, by definition, fulfill the needs of the entire community.” But no one would seriously contend that a broadcast station that is dedicated to a religious licensee’s religious mission, and that designs its religious hiring practices in the manner it believes best promotes that mission without unlawfully discriminating against minorities or women of the religious licensee’s faith, somehow fails to serve community needs. Indeed, it is the opposite that is true -- any refusal by the Commission to license radio stations to religious groups or to allow those groups broad discretion to staff their stations so as to serve their religious missions, would destroy an enormous source of diversity in broadcasting in a pluralist society.

Respectfully submitted,

**THE LUTHERAN CHURCH-MISSOURI
SYNOD**

By: 

Richard R. Zaragoza
Kathryn R. Schmeltzer
Barry H. Gottfried
Scott R. Flick

Its Attorneys

FISHER WAYLAND COOPER LEADER
& ZARAGOZA L.L.P.
2001 Pennsylvania Avenue, N.W.
Suite 400
Washington, D.C. 20006-1851
(202) 659-3494

March 1, 1996

CERTIFICATE OF SERVICE

I, Susan R. Fisenne, a secretary for the firm of Fisher Wayland Cooper Leader & Zaragoza L.L.P., do hereby certify that I have this 1st day of March 1996, mailed by First Class, United States mail, postage paid, the foregoing **"RESPONSE TO SUBMISSION OF SUPPLEMENTAL AUTHORITIES"** to the following:

* The Honorable Joseph A. Marino
Chairman
Review Board
Federal Communications Commission
2000 L Street, N.W., Room 211
Washington, D.C. 20554

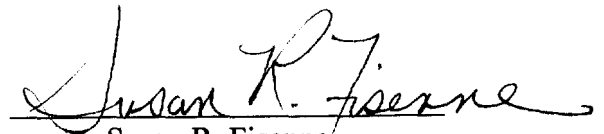
* The Honorable Marjorie R. Greene
Member, Review Board
Federal Communications Commission
2000 L Street, N.W., Room 206
Washington, D.C. 20554

* Leland J. Blair, Esq.
Acting Chief for Law
Review Board
Federal Communications Commission
2000 L Street, N.W., Room 203
Washington, D.C. 20554

* The Honorable Arthur I. Steinberg
Administrative Law Judge
Federal Communications Commission
2000 L Street, N.W., Room 228
Washington, D.C. 20554

* Robert Zauner, Esq.
Federal Communications Commission
Mass Media Bureau
2025 M Street, N.W. Room 7212
Washington, D.C. 20554

David E. Honig, Esq.
Minority Media Ownership & Employment Council
3636 16th Street, N.W. Suite B366
Washington, D.C. 20010


Susan R. Fisenne

*Via Hand Delivery